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No. 82-660

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In contending that he received ineffective assistance of counsel at trial, respondent, in his pro se Responsive Brief to the Petition for Writ of Certiorari (at 8-11), places "special emphasis" (*id.* at 19) on material contained in his Motion for a New Trial and exhibits thereto. As respondent concedes (Pro Se Br. 11), however, the new trial motion was denied by the district court without reaching the merits, because the case was then pending on appeal. See Fed. R. Crim. P. 33. As a result, no hearing was held on the new trial motion and the district court made no findings on the allegations contained therein, including those pertaining to defense counsel's asserted failure to investigate a foreclosure sale in Texas or other matters.

The new trial motion and exhibits accompanying it were certified to the court of appeals as part of a Supplemental Record on Appeal, but the court of appeals did not rely on

respondent's specific allegations in the new trial motion or matters in the exhibits in concluding that respondent had been denied effective assistance of counsel. Nor could it properly have done so, because no findings had been made by the district court regarding the substance of respondent's contentions in the motion; whether defense counsel in fact was aware of or investigated the matters respondent mentioned; whether any such lack of awareness or failure to investigate departed substantially from the performance that could have been expected of reasonably competent defense counsel; and whether and in what manner the conduct or outcome of the trial might have been affected had counsel investigated the matters respondent identifies.[1]

The court of appeals instead held (Pet. App. 3a) that it was not necessary for repondent to specify errors by defense counsel in order to establish ineffective assistance of counsel in the circumstances of this case. In so doing, the court

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[1]The various allegations contained in the separate brief in opposition filed by counsel for respondent (at 3), on which there likewise has not been an evidentiary hearing, also do not support reversal of respondent's conviction. For example, it is irrelevant—in the absence of a showing that counsel was somehow precluded from preparing an adequate defense—that the government's witnesses came from four states and that respondent lived in Florida and Georgia. The fact that defense counsel did not make numerous objections during trial or object to the jury instructions could reflect the exercise of reasonable tactical or legal judgment; it does not in any event support a finding of ineffective assistance of counsel without a showing that there was an objection that reasonably competent defense counsel would have made, and that respondent suffered prejudice as a result of his attorney's failure to make that objection.

The period of time over which the government's investigation was spread and the number of documents produced as a result likewise do not, without more, establish a basis for reversal. There has been no showing that Colston and Rivas were unable to review all relevant materials or, if they did not, the reasons for and consequences of their failure to do so. The same is true with respect to counsel's alleged failure to consult an accountant.

expressly declined to apply the test for ineffective assistance of counsel utilized by the Tenth Circuit: whether counsel failed to exercise " 'the skill, judgment and diligence of a reasonably competent defense attorney' " (Pet. App. 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court accordingly did not identify any act or omission of counsel that it regarded as error, much less find that any such error was of sufficient magnitude that counsel's performance must be held to have departed substantially from the range of competence that reasonably may be expected of defense counsel. Rather, the court concluded that respondent had received ineffective assistance of counsel based solely on defense counsel's having had "only" 25 days to prepare for trial, attorney Colston's lack of prior experience in criminal trials, and the court's own observation that mail fraud trials tend to be complex (Pet. App. 4a-5a)—without any assessment of the complexity of this particular case or whether Colston and his colleague, Rivas, had failed to comprehend it in a manner that had any adverse impact on their representation of respondent.

For the reasons stated in the petition for a writ of certiorari (at 10-17), in the absence of a finding that the factors upon which the court of appeals relied led to a performance by counsel at trial that substantially departed from that which could be expected of reasonably competent defense counsel and that respondent was prejudiced in some manner as a result,[2] there was no basis for concluding that

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[2]Since the petition for a writ of certiorari was filed in this case, the Fifth Circuit rendered its en banc decision in *Washington* v. *Strickland*, 693 F.2d 1243 (1982). (The panel's opinion in that case was cited in the certiorari petition, at 14.) The en banc court held that in order to obtain relief on collateral attack on the ground of ineffective assistance of counsel, the petitioner must prove that his attorney's acts or omissions caused "actual and substantial disadvantage to the course of his

counsel's performance was constitutionally ineffective. Reversal of the judgment of the court of appeals on this ground would not foreclose later consideration of the more specific allegations of ineffective assistance of counsel raised by respondent in his pro se Responsive Brief or by his attorney in his separate brief in opposition, matters that should be addressed in the first instance by the district court.[3]

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defense." *Id.* at 1262. Unlike the District of Columbia Circuit in *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.) (en banc), cert. denied, 444 U.S. 944 (1979), the court declined to adopt a test that focused on the likelihood that counsel's conduct affected the outcome of the proceedings. 693 F.2d at 1261-1262. It is not clear how significant the difference between these two approaches would be as a practical matter. In any event, there is no need in this case to consider which approach is preferable, because the court of appeals made no finding of prejudice that would satisfy either of these formulations.

[3]Since the petition for a writ of certiorari was filed in this case, a divided panel of the Tenth Circuit vacated its previous opinion in *United States* v. *Golub*, 638 F.2d 185 (1980) (cited in the petition, at 14 n.7, 20 & n.12), and affirmed the conviction in that case. *United States* v. *Golub*, 694 F.2d 207 (10th Cir. 1982). In its latest decision in *Golub*, the court adhered to the approach taken in *United States* v. *King*, 664 F.2d 1171, 1173 (10th Cir. 1981), and the instant case, but, on the facts there presented, rejected the claim that defense counsel had inadequate time to prepare for trial. 694 F.2d at 214-217. Review of the decision below therefore continues to be warranted to correct the erroneous approach taken by the Tenth Circuit in this line of cases.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
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